Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
XM Satellite Radio Holdings Inc.	)	MB Docket No. 07-57
Transferor	)	
	)	
and	)	
	)	
Sirius Satellite Radio Inc.	)	
Transferee	)	
	)	
Consolidated Application for Authority to	)	
Transfer Control of XM Radio Inc. and	)	
Sirius Radio Inc.	)	

COMMENTS OF
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The proposed license transfers between XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. should be approved by the Commission because the merger of the XM and Sirius satellite radio services will serve the public interest.[1] In today's dynamic, fast-changing digital communications environment, it is especially important that the Commission not take an unduly narrow view of what constitutes a relevant market for

* These comments express the views of Randolph J. May, President of the Free State Foundation, an independent, non-profit free market-oriented think tank. They do not necessarily represent the views of the Board of Directors or others associated with FSF.
[1] 47 U.S.C. § 310(d).

purposes of assessing competitive impacts. Absent strong and reliable indications that a merger will harm consumers, if the FCC does take such an unduly narrow view under the rubric of its vague public interest authority, it is likely to stifle investment in new communications networks and innovation in new services and applications.[2] In that event, consumers will be the ultimate losers.

I. The Relevant Market Is The Audio Entertainment Market

The opposition to the proposed merger, led by the National Association of Broadcasters, centers on the claim that satellite radio service constitutes a distinct, separate market, and, therefore, the XM-Sirius combination would be a so-called "merger to monopoly." It is more appropriate to view satellite radio as one part of a larger audio entertainment and information services market. In this broader market, satellite radio competes with terrestrial radio broadcasters, including new HD radio services; Internet radio broadcasters; iPods and other portable music players, and mobile phones and other wireless devices. Each of these various platforms and/or technologies offers a means of distributing audio entertainment and information, or, if you will, competes for consumers' ears and dollars. It defies common sense to

[2] When I first wrote about the merger proposal shortly after it was announced, I stated: "A narrow view might lead [the DOJ and/or FCC officials] not only to reject the merger, but to maintain in place outdated regulations that have the effect of chilling innovation and stifling investment." Randolph J. May, "Is Uncle Sam Serious About Sirius-XM," April 16, 2007, at http://news.com.com/Is+Uncle+Sam+serious+about+Sirius-XM/2010-1028_3-6176213.html.

suggest that a XM and Sirius do not compete in this broader marketplace, especially against terrestrial broadcasters who offer a "free" service.

A UBS research report examining the proposed merger characterized the market this way:

> The combination of an enhanced programming lineup with improved technology, distribution and financials will better position satellite radio to compete for consumers' attention and entertainment dollars against a host of products and services *in the highly competitive and rapidly evolving audio entertainment marketplace*: including free 'over the air' AM and FM radio, iPods, mobile phone streaming, HD Radio, Internet Radio, and next-generation wireless technologies.[3]

The report stated that "Sirius and XM are expected to create a stronger platform for future innovation within the audio entertainment industry."[4] According to UBS, the merger is expected to lead to efficiencies that will accelerate innovation that is "essential to remaining competitive in the consumer electronics-driven world of audio entertainment."[5]

A report from Merril Lynch is to the same effect in describing the marketplace:

> The merged company could ultimately deliver greater content (more niche channels given greater bandwidth), offer improved technology (radio receivers and traffic/data products), realize cost synergies and help satellite radio *remain competitive in the evolving audio entertainment landscape as it competes with terrestrial radio, Internet audio media, HD radio and portable music players*.[6]

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[3] "Consolidation of SIRI and XM Announced," UBS, February 20, 2007, at 5. (Emphasis supplied.)
[4] Id., at 4.
[5] Id.
[6] "Sirius Satellite Radio Inc.," Merrill Lynch, February 20, 2007, at 1. (Emphasis supplied.)

In addition to citing technological innovation as one of the benefits, Merrill sees as another benefit: "Greater programming and content choice, including the ability for consumers to choose their content on a more a la carte basis."[7] In sum, if the merger is approved the combined XM-Sirius will be a "[m]ore competitive audio entertainment provider given the ability to leverage its capital to provide more content using improved technology as satellite radio *competes for consumer attention in an increasingly crowded audio entertainment marketplace*."[8]

And this from a 2007 report from Arbitron:

> Developments in technology have dramatically broadened the choices
> available... [for] audio programming. By the late 1990s, consumers had
> the newfound ability to listen to audio "streamed" over the Internet, and
> two new radio satellite services were born. Digital radio has continued to
> evolve with the advent of podcasting... and HD Digital Radio... In the
> past, "radio" was limited solely to what was available on the AM/FM dial.
> Today radio choices for consumers appear to have no bounds.[9]

Thus, independent analysts consider satellite radio part of the broader audio entertainment and information services market. Common sense so dictates. If consumers become dissatisfied with either the price or quality of

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[7] Id., at 3.

[8] Id., at 3. (Emphasis supplied.)

[9] "The Infinite Dial 2007: Radio's Digital Platforms, Arbitron, at 1, at: http://www.arbitron.com/downloads/digital_radio_study_2007.pdf.

the services offered over satellite radio, they will turn to one of the audio alternatives, including "free" radio.[10]

But perhaps the most convincing confirmation comes in the form of the National Association of Broadcasters' fierce opposition to the proposed merger. If satellite radio constitutes a distinct market, why would the terrestrial broadcasters devote so many resources to trying to defeat the merger? The answer, of course, is that satellite radio does, in fact, compete with terrestrial AM, FM, and HD radio, and a combined XM-Sirius, with the cost savings realized,[11] should be a stronger competitor than either alone.[12] It is perfectly natural for NAB and the terrestrial broadcasters it represents to prefer not to face a more robust competitor in the sky. But the public interest is not served by protecting competitors; it is served rather by actions which promote more robust competition.

The fierce opposition —in the regulatory arena— of the NAB and terrestrial broadcasters to satellite radio is not new. It has existed from the day that the NAB caught a glimpse of the gleam in the eye of the first

[10] Each year the FCC issues a report examining the status of video competition. In the last report in March 2006, the Commission concluded that "the market for the delivery of video programming services is served by a number of operators using a wide range of distribution technologies." Video Competition Report, FCC 06-11, at para. 3. The agency included in its competitive examination cable operators, satellite television operators, telephone companies providing video service over their broadband facilities, wireless cable operators, Internet-based video services, and DVDs and videocassettes. There is no reason why the full range of distribution technologies similarly would not be considered in assessing competition in the audio services market.

[11] The UBS and Merrill analyst reports cited about put the cost savings in the range of $3-4 billion, and other projects are in the same range or higher.

[12] In 2006, the revenues from satellite radio ($1.6 billion) constituted approximately 7% of overall radio revenues ($21 billion). Thus, while satellite radio is part of the broader audio market, it has a relatively small market share.

satellite radio dreamer. In FCC comments in 1995 urging various restrictions on satellite providers, the NAB stated:

> One way that the Commission can act to minimize the harmful effects of satellite DARS introduction is to structure it as a subscription-only service, as the NAB has proposed. Although satellite DARS will have a competitive impact on terrestrial stations in every radio market no matter what its regulatory classification, the NAB has urged the Commission to soften this blow to the greatest extent possible. Canvassing the Commission's available regulatory options, a subscription requirement will introduce at least some level of differentiation between satellite DARS and terrestrial radio, and will help to minimize the direct impingement by satellite DARS providers into markets for advertising sales.[13]

While the NAB wanted to do everything possible in 1995 to minimize the competitive impact of the new SDARS providers by constraining their operations, it made clear to the FCC that, regardless whether satellite providers offered an advertising-supported service or not, they would compete in the same market:

> Whether it is advertising-supported or not, satellite DARS providers fundamentally will compete with terrestrial broadcasters for listeners. Because audience impacts are the primary driver in the radio business, smaller audiences translate into reduced sales of advertising to both local and national advertisers, notwithstanding DARS suppliers' focus of subscriptions or national advertisers for support.[14]

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[13] Reply Comments of NAB, Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service, IB Docket No. 95-91, October 13, 1995, at 34-35.

[14] Id., at 34. The excellent paper submitted to the FCC on June 14, 2007 on behalf of XM and Sirius by former FCC Chief Economist and Professor of Law Thomas Hazlett contains these and many more statements by the NAB showing its consistent opposition to SDARS. See Appendix 1 for a catalogue of these NAB statements.

With respect to the view that satellite radio would compete against terrestrial broadcasters in the same market, NAB's view, at the FCC, has at least been consistent over the years. For example, in arguing recently for a relaxation of the Commissioner's ownership rules, the NAB observes: "NAB documents, in detail, audience fragmentation and increasing competition for advertising revenue experienced by broadcast stations, as a result of new entry by cable television, satellite television and radio, numerous Internet video and audio applications, and mobile devices such as MP3 players."[15]

This observation by the NAB –and, as the Commission is aware, there are many more to the same effect—is, in my view, essentially an accurate characterization of the competition that is occurring in the marketplace. It is for that reason that the contention that the proposed XM-Sirius merger would be a "merger to monopoly" is a highly questionable characterization.

II. A Narrow View of the Market Will Lead to Unnecessary Regulation

Approval of the merger should lead to public interest benefits through the increased investment and innovation that will be spurred by the cost savings realized through integration. And by eliminating carriage on each separate system of the many channels that are now carried in common by both XM and Sirius, it is most likely that new programming will be developed

[15] See NAB's Comments in the Quadrennial Ownership Proceeding, MB 06-121, MB 02-277, MM 01-235, MM 01-317, MM 00-244, at http://www.nab.org/AM/Template.cfm?Section=Filings1&CONTENTID=7064&TEMPLATE=/CM/ContentDisplay.cfm.

and offered on the freed-up channel capacity. Thus, there should be opportunities for the combined XM-Sirius to carry a channel line-up that caters to an even more diverse array of specialized tastes than at present.

But more is at stake in this proceeding than the fate of the particular merger applicants. For if the Commission denies the merger based on an unduly restrictive and static view of the marketplace, it is much more likely that it will retain in force rules and regulations that no longer make sense in today's environment —the environment of competition and audience fragmentation that NAB describes, correctly, in its FCC comments on media ownership restrictions. If the Commission determines that satellite and terrestrial radio are not competitors, or that Internet radio is not a factor in the audio entertainment and information services market, then it is much more difficult for the Commission to justify relaxing the ownership rules that apply to local broadcasters. Indeed, it would be more difficult to justify relaxation or elimination of other outdated rules that were put in place premised on the market dominance of local radio broadcasters.

Because there already has been so much change in the market in the direction of consumer choice of audio services, and with the prospect of even more alternatives available as technologies continue to evolve, it disserves the public interest for the Commission to retain in place rules designed for an earlier era. In order to avoid making it more difficult to eliminate ownership restrictions and other outdated rules that impose unnecessary direct and indirect costs, in evaluating the proposed merger the Commission should take care not to ignore the dynamic and self-evident changes in the marketplace that the NAB itself has recognized many times in its FCC pleadings.

III. Conclusion

In considering the proposed merger of XM and Sirius, the FCC should have in mind the dynamic nature of the communications marketplace, including the competitive and rapidly-changing landscape of the audio services market. Because satellite radio providers compete for listeners with terrestrial broadcasters, Internet radio, cell phones and other wireless technologies, and portable music devices, the Commission should acknowledge the reality of this broader audio services and entertainment marketplace. An unduly narrow determination that satellite radio providers compete in a separate and distinct would have negative ramifications for the success of further regulatory reform efforts directed towards relaxation of the Commission's ownership rules and elimination of other outdated regulatory requirements.

Respectfully submitted,

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